

In the Federal Court case of *Arumugam Pillai v Government of Malaysia*¹ Gill CJ (Malaya) said at p 73:

In our judgment limitation as such does not apply to any proceedings by the government for the recovery of any tax. This would seem clear from the proviso to s 33(1) of the Limitation Ordinance 1953.

This principle has been reiterated in the Supreme Court case of *Chong Woo Yit v Government of Malaysia*² where Gunn Chit Tuan SCJ cited at p 474 the above passage (and one other sentence following it) and said:

We would agree that by virtue of the proviso to s 33(1) of the Limitation Act 1953, limitation does not apply to the commencement of any proceedings by the government for the recovery of any tax or interest thereon, ...

The Supreme Court agreed with the rider in *Arumugam's* case¹ (I have not reproduced either passage) relating to the defence of limitation when it is raised in regard to an assessment under s 91 of the Income Tax Act 1967 but that rider does not concern us in this case.

With respect to counsel for the defendant, I cannot see how he can argue that because the additional tax assessed has become a 'debt', it therefore is barred from recovery under s 6(1)(d) of the Limitation Act 1953. The word 'debt' in s 106(1) does not change the complexion of the amount that is claimed; it still is a tax which in the words of the provision is 'due and payable' and may be recovered by civil proceedings. So far as the late payment increases are concerned, whatever their nature and whether they amount to 'penalties' or not, they are by statute deemed to be taxes for the purposes of their recovery; they 'shall be recoverable as if (they) were tax due and payable under this Act'. And in the same way they too, by virtue of s 106(1), may be recovered by way of civil proceedings. I cannot see how the Limitation Act 1953 bars the recovery of these amounts, ie the additional tax or the late payment increases bearing in mind the principle enunciated in *Arumugam Pillai*¹ and *Chong Woo Yit*.²

As previously stated, the certificate under s 142(i) of the Act was filed with the O 14 application. The senior assistant registrar acted on this certificate and was therefore right in giving leave to the plaintiff to sign final judgment against the defendant.

In the circumstances, I dismissed the appeal of the defendant.

Appeal dismissed.

Solicitors: *Yeap Chye Choon & Co.*

Reported by *Yap Shao Sin*

A **Bank Bumiputra Malaysia Bhd v Galian Saham Sdn Bhd & Ors**

HIGH COURT (IPOH) — CIVIL SUIT NO 23-351-87
PEH SWEE CHIN J
10 MAY 1989

B *Banking — Claim under charge executed — Whether guarantee having limit executed by same party limits liability of chargor — Duty of care of chargee to chargor — Whether duty discharged*

C *Civil Procedure — Statement of claim based on charge — Separate cause of action arising from each transaction — Cause of action on guarantee intentionally left out — Rules of the High Court 1980, O 14*

The first defendant was a customer of the plaintiff bank. Overdraft facility was given on the security of a charge executed by the second defendant over a piece of mining land of the second defendant. Further security was provided by two letters of guarantee signed by the second and third defendants respectively subject to certain expressed limits. The plaintiff's claim against the second defendant was only in its capacity as chargor and not as guarantor. Summary judgment was obtained by the plaintiff and the second defendant appealed.

E The second defendant (chargor) alleged that (a) the liability was limited to 60% of the overdraft facility granted which the chargor had agreed to pay on demand by virtue of the letter of guarantee; (b) the plaintiff owed a duty of care to the chargor as the mining lease was allowed to expire in June 1985, and this action was only filed in 1987.

Held, dismissing the second defendant's appeal:

F (1) The plaintiff's claim, as can be read from the statement of claim against the second defendant, was on the charge and not on the guarantee. Each will give rise to separate and distinct causes of action. There was nothing in the charge documents which set any limit of repayment. No reference to the charge was made in the letter of guarantee to the effect that whatever sum which the chargor agreed to repay in any subsequent charge to be signed would be void unless that such sum was limited.

G (2) The duty of care of a chargee towards a chargor would be to make it, as far as possible, for the chargor to repay as little as possible, or to have as much surplus as possible after sale of the charged land. Judicial notice was taken of the fact that the chargor was a financially powerful company created and owned by the state government who had been the issuing or renewing authority of any mining lease in the state. These factors could have played a crucial role in the plaintiff granting the overdraft facility. To renew a mining lease which was to expire soon would obviously be much more for the benefit of the chargor than the chargee in view of the personal covenant to pay and the fact judicially noticed by the court. To sell the mining lease not at the request of the chargor would amount to the withdrawal of the overdraft facility of which the first defendant was in dire need. As such the plaintiff had not been in breach of the duty of care.

I [Editorial Note: The second defendant appealed to the Supreme Court vide Civil Appeal No 03-43-89. The appeal was heard and dismissed by the Supreme Court on 13 December 1989.]

Cases referred to

- 1 *Standard Chartered Bank v Johnny Walker* [1982] 1 WLR 1410 (refd)
- 2 *Donoghue v Stevenson* [1932] AC 562 (refd)

Ng Chew Hor for the plaintiff.
S Jeya Palan for the second defendant.

Cur Adv Vult

Peh Swee Chin J: The first defendant was a customer of the plaintiff bank in respect of money lent to the first defendant on the security of a charge executed by the second defendant over a piece of mining land of the second defendant. Further security for such money was provided by two letters of guarantee signed by the second defendant and the third defendant respectively subject to certain express limits stated in such letters of guarantee.

It is of immediate importance that I should forthwith deal with the statement of claim by which it would be clear without any doubt that the second defendant was only sued in its capacity as a chargor of the mining land which it owned and not as a guarantor at all by virtue of the said letter of guarantee it had executed in addition to the said charge over the said mining land. That this omission to sue the second defendant (hereafter 'the chargor') qua guarantor was deliberate was further borne out, superfluously though, by the third defendant having been sued as a guarantor. No one reading the statement of claim ought to be misled as to what the plaintiff wanted.

The plaintiff took out an O 14 application against the chargor and succeeded in obtaining final judgment of the amount claimed. An appeal from the learned registrar's decision in this connection was dismissed by me with costs, and now I give my grounds of decision.

The chargor took two points. The first point was that the liability was only limited to 60% of the overdraft facility or amount granted by the plaintiff to the first defendant (secured also by the charge executed by the chargor), ie \$39,600 which the chargor had agreed to pay to the plaintiff on demand in the letter of guarantee signed by the chargor also. For the purpose of this matter, it would not be necessary to set out the letter of guarantee herein.

Learned counsel for the chargor argued that it was clearly the intention that the liability of the chargor should be limited to \$39,600 and no more by virtue of the letter of guarantee, and because of such intention, the chargor's liability to repay the larger amount as spelt out in the annexure to the charge signed by the chargor was void and of no effect.

Learned counsel for the plaintiff submitted that the plaintiff was enforcing the covenant to pay in the charge. To say there was a limit of 60% for the chargor would, it was submitted to the effect, contravene s 92 of the Evidence Act 1950.

The argument of the chargor's counsel was startling; he had clearly failed to appreciate that the letter of guarantee and the charge were separate transactions or docu-

A ments which would give rise to separate and distinct causes of action. Nothing in the said charge documents between the chargor and the plaintiff had set any limit of repayment to \$39,600 or 60% of \$66,000, and in this connection these documents were signed on a date after the signing of the relevant letter of guarantee. On the contrary, in the charge documents, the chargor agreed to pay on demand the specified sum of \$60,000 with interest on monthly rests etc. The chargor and the plaintiff had so declared and bound themselves. No reference to the charge (which was to be signed) was made in the letter of guarantee to the effect that whatever sum, which the chargor agreed to repay in any subsequent charge to be signed, would be void unless that such sum was limited to \$39,600 and counsel's argument was devoid of any merit at all.

The second point raised by learned counsel for the plaintiff was specious, rather than one of substance. It was submitted that the mining lease in respect of the mining land that was charged by the chargor was for a period of ten years, expiring on 23 June 1985. The plaintiff had filed the present action in 1987, ie two years after expiry date of the mining lease. It was further submitted that the mining lease could have been sold (ie before its expiry), and should not be allowed to expire, and that there was a duty of care owed to a guarantor and the chargor, and in support, the case of the *Standard Chartered Bank v Johnny Walker*¹ was cited.

In reply learned counsel for the plaintiff said that the case was distinguishable, and in the instant case, by virtue of cl 28 of the annexure to the charge, the chargee was given discretion to increase credit to the chargor or to determine it.

It would be clear that the chargor had tried persistently to embroil the plaintiff in the letter of guarantee but the plaintiff appeared resolute to have no part of it.

However, the chargor's counsel mentioned that such duty of care was also owed to the chargor of the charge in the instant case. This court could not blind itself to the point once it was raised.

In *Standard Chartered Bank*,¹ it was held that the receiver appointed pursuant to a debenture signed in favour of the bank, in realizing assets, had owed a duty of care to the guarantors in that case to obtain the best price and to choose the time to sell the assets in the circumstances permitted, and that the bank there would be attached with the receiver's action if the banks had interfered with the conduct of receivership. Lord Denning in that case made an obiter dictum that a duty of care would also be owed by a mortgagee to a mortgagor to obtain, in the circumstances, the best possible price and exercise a reasonable degree of care in choosing the time, not to sell at the worst possible time.

By analogy, the obiter dictum of Lord Denning to a mortgagee, in my view, should apply equally to a chargee who ought to owe such a similar duty of care in selling by public auction the charged land.

However, in the instant case, the parties were not concerned with the sale of the mining lease in an auction ordered in the foreclosure proceedings, and no question about the best possible price arose. Here the chargee had sued the chargor on a 'personal' covenant to pay. The time to sell, from the dictum of Lord Denning should mean the time in foreclosure proceedings after the court has granted an order of sale by public auction. The *Standard Chartered Bank* case¹ was not strictly applicable to the instant case.

However, in view of the principle of neighbour-in-law of Lord Atkin of the *Donoghue v Stevenson*² fame, following the reasoning of Lord Denning in *Standard Chartered Bank*,¹ in my view, the duty of care of a chargee towards a chargor would be to make it, as far as possible, for the chargor to repay as little as possible, or to have as much as possible any surplus after sale of charged land. Then, the next question to me was whether the plaintiff as chargor had been guilty of any breach of such duty of care.

The court took judicial notice of the fact that from its structure, the chargor was a financially powerful company, it was created and owned by the state government of Perak. The fact was too well-known except to the most uninitiated in matters of commerce in Perak or any other state in Malaysia. The state government has been the issuing or renewing authority of any mining lease in Perak. All these could have played a crucial role in the plaintiff granting the overdraft facility. To renew a mining lease which was to expire soon would obviously be much more for the benefit of the chargor than the chargee in view of personal covenant to pay and the fact judicially noticed by the court. To sell the mining lease, not at the request of the chargor, would amount to the withdrawal of overdraft facility of which the borrower (first defendant) was in dire need. All the circumstances indicated that the plaintiff, as chargee, had not been in breach of the duty of care explained above. I therefore found the second point of the chargor to be of no substance.

It should not require a long and expensive trial to determine the points raised if they could be decided here and now. I therefore dismissed the appeal of the chargor, ie the second defendant with costs.

Appeal dismissed.

Solicitors: *Choong Yik San & Robiha; Maxwell Kenion Cowdy & Jones.*

Reported by *Yap Shao Sin*

A Public Prosecutor v Wong Yee Sen & Ors

HIGH COURT (KUALA LUMPUR) — FEDERAL
TERRITORY CRIMINAL TRIAL CR NO 58-2-86
FAIZA TAMBY CHIK JC
2 NOVEMBER 1989

B *Criminal Procedure — Cautioned statement — Not introduced at prosecution stage — Whether prosecution can use cautioned statement of accused during case for defence to impeach credit of accused during cross-examination — Criminal Procedural Code (FMS Cap 6), s 113 — Evidence Act 1950, ss 145, 146 & 155(1) — Dangerous Drugs Act 1952, s 37A*

C In this case the accused were charged with trafficking in a dangerous drug. At the end of the prosecution's case the court ruled that a prime facie case had been made out and the accused were called to enter upon their defence. The first accused elected to give evidence on oath and during the cross-examination of the accused, the prosecution sought to introduce the cautioned statement of the accused to impeach his credit. Counsel for the first accused objected as he said the cautioned statement had not been admitted in evidence at the prosecution stage.

Held, that the following procedures should be taken as regards the cautioned statement:

(1) A cautioned statement of an accused person, provided that it is voluntary, not introduced during the prosecution's case, can be permitted to be used by the prosecution to impeach the credit of the accused person during the case for the defence.

(2) The cautioned statement of the accused person should be shown to the judge in order for him to determine the contradictory portion in the accused's cautioned statement. If the judge finds material contradiction in the cautioned statement, a trial within a trial should be held to determine the admissibility of the cautioned statement. The said contradictory portion must be proved and brought to record.

(3) The said contradictory portion cannot be admissible as evidence of the fact stated therein except for the purpose of impeaching the accused's credit.

Cases referred to

- G 1 *PP v Teng Chen Choi* [1989] 1 CLJ 56 (not folld)
- 2 *PP v Peh Ning Ning* Federal Territory Criminal Trial No 46185 (unreported) (refd)
- 3 *Dato Mokhtar bin Hashim v PP* [1983] 2 MLJ 232 (folld)
- 4 *Tua Kin Ling v PP* [1970] 2 MLJ 61 (folld)
- 5 *Husdi v PP* [1980] 2 MLJ 80 (folld)
- 6 *Krishnan & Anor v PP* [1981] 2 MLJ 121 (folld)
- H 7 *Yusoff bin Sidin v PP* [1971] 1 MLJ 203 (folld)
- 8 *Pavone v PP* [1986] 1 MLJ 72 (folld)
- 9 *Jones v Rex* [1948] MLJ 182 (folld)
- 10 *Muthusamy v PP* [1948] MLJ 57 (folld)
- 11 *Muluk bin Ahmad & Anor v PP* [1989] 2 MLJ 151 (refd)

Legislation referred to

- I Criminal Procedure Code (FMS Cap 6) s 113
- Dangerous Drugs Act 1952 s 37A
- Evidence Act 1950 ss 145, 146, 155(c)

Jalaludin bin Salleh (Deputy Public Prosecutor) for the Public Prosecutor.

Gulam Mustaffa bin Nadar Ali Khan for the first accused.
Leong Wey Pye for the second accused.